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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1109

THE PROCTER AND GAMBLE COMPANY and FMC CORPORATION, *Petitioners,*

v.

THE CITY OF CHICAGO, *Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICUS CURIAE OF THE CHEMICAL SPECIALTIES MANUFACTURERS ASSOCIATION IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

On March 6, 1975, The Procter and Gamble Company and FMC Corporation petitioned this Court for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit in the above-captioned case. Also on March 6, 1975, the Chemical Specialties

Manufacturers Association received from respondent City of Chicago its express consent to file this brief as an *amicus curiae* pursuant to Rule 42 of the Rules of the Supreme Court of the United States. Further, this brief is lodged with the express consent of petitioners.

INTEREST OF THE AMICUS CURIAE

Chemical Specialties Manufacturers Association (hereinafter "CSMA") is a nonprofit membership corporation composed of approximately four hundred manufacturers, suppliers, packagers, distributors and marketers of chemical specialty products for household use. CSMA includes various divisions delineated according to product groups, including the aerosol, disinfectant, insecticide, waxes and polishes, detergent, and transportation products divisions.

The instant proceeding is of particular concern to CSMA's member companies, as well as to all manufacturers and distributors of consumer and agricultural commodities whose products are marketed in interstate commerce. The free flow of consumer products in interstate commerce is assured by the Commerce Clause of the Constitution.[1] However, in this case the decision of the Court of Appeals incorrectly restricts the application of the Commerce Clause to the means of transport, leaving consumer products subject to such burdens on movement as a state, county, or city may impose. The increasing and disparate local regulation of products and so-called pollutants has resulted in a patchwork of inconsistent distribution and marketing requirements for industry and businesses operating in interstate commerce. No federal court has construed

[1] U. S. CONST. art. I, § 8.

the Commerce Clause so narrowly as has the court below. See, *Chemical Specialties Manufacturers Association* v. *Lowery*, 452 F.2d 431 (2d Cir. 1971); *Chemical Specialties Manufacturers Association* v. *Clark*, 482 F.2d 325 (5th Cir. 1973). See also, *National Bellas Hess, Inc.* v. *Department of Revenue*, 386 U.S. 753, 759 (1967). It is in pursuit of these concerns that CSMA lodges this *amicus* brief in support of the Petition for a Writ for Certiorari.

QUESTION PRESENTED

Whether the Commerce Clause protects the interstate distribution of a common commodity from unreasonable local restraints.

STATEMENT OF THE CASE

In overturning a district court injunction, the appellate court has held that the City of Chicago's ordinance barring the sale of phosphate detergents does not impose an undue burden on interstate commerce and that therefore the local ordinance is not constitutionally proscribed. The district court, after hearing, found that the ordinance unduly burdened interstate commerce by interfering with the normal operation of companies selling consumer products in interstate commerce. The appellate court simply disagreed, and incorrectly limited the Commerce Clause protections to interstate carriers and instrumentalities of transport. Slip Opinion at 10, *Procter and Gamble Co.* v. *City of Chicago*, No. 73-1650 (7th Cir., Jan. 15, 1975). The Court of Appeals did not disturb any of the findings of the district court, nor did it find a lack of support in the record for any findings. Rather, it fashioned a novel conclusion which strips the Commerce Clause of its vitality

and renders the interstate distribution of consumer products subject to the whimsical interference of every government instrumentality in the United States. The appellate court's conclusion is flatly inconsistent with the long series of decisions by this Court extending from *Gibbons* v. *Ogden*, 9 Wheat. 1 (1824) through *Allenberg Cotton Co.* v. *Pittman*, — U.S. —, 42 L.Ed. 2d 195 (1974).

REASON FOR GRANTING THE WRIT

Contrary to the Decisions of This Court, the Court of Appeals Has Incorrectly Held that the Interstate Distribution of a Commodity Is Not Entitled to the Same Degree of Protection from Local Legislative Impediments to Its Free Flow as that Accorded Interstate Carriers and Instrumentalities of Transport.

The crux of the appellate court's ruling is:

> . . . we are not confronted with a situation in which legislation has reduced the effectiveness of a means of transportation itself. In this context the ordinance is not a burden on interstate commerce, but is merely a "burden" on a company which happens to have interstate distribution facilities.
>
> * * *
>
> There is no impairment in the ultimate ability to transport in interstate commerce in the most efficient and economical manner possible. [Slip Opinion at 10, *Procter and Gamble Co.* v. *City of Chicago, supra.*][2]

By holding that because an instrumentality of transport is not involved, a burden on a company's interstate distribution facilities is not a burden on interstate commerce, the appellate court's opinion is flatly

[2] Also cited in Petitioners' Brief for Certiorari at A-10, A-11, *Procter and Gamble Co.* v. *City of Chicago*, No. 74-1109 (U.S., filed Mar. 6, 1975).

inconsistent with this Court's application of the Commerce Clause. *In Lemke v. Farmers Grain Company*, 258 U.S. 50 (1922), a local regulation was attacked by interstate distributors because it interfered with their method of purchasing, shipment and sale of grain in the usual course of business. The commodity was subject to an elaborate local system of grading and inspection. This Court held that the state legislation unduly burdened interstate commerce in its effect on the complainant's business. *Accord, Dahnke-Walker Milling Co.* v. *Bondurant*, 257 U.S. 282, 290-91 (1921); *Shafer* v. *Farmers Grain Co.*, 268 U.S. 189 (1924).

This Court has consistently applied Commerce Clause protections to strike down burdensome local impediments to commodities moving in interstate commerce. In *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137 (1970), this Court struck down local regulation which forced a commercial farmer to alter its interstate scheme of packaging and processing of farm produce. And very recently this Court reiterated that the Commerce Clause protection from local interference extends to any course of dealing in a commodity which traverses "a long interstate pipeline." *Allenberg Cotton Co.* v. *Pittman*, — U.S. —, 42 L.Ed.2d 195, 201 (1974).

In support of the proposition that Chicago's ban on phosphate detergents is not a burden on interstate commerce because it does not constitute legislation which reduces the effectiveness of a means of transportation itself, the Court of Appeals noted *Bibb* v. *Navajo Freight Lines, Inc.*, 359 U.S. 520 (1959), and *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761 (1945). Neither *Bibb* nor *Southern Pacific* stands for the proposition that interstate carriers and instrumentalities

of transport are entitled to a greater degree of Commerce Clause protection from locally enforced impediments than are common commodities which are the subject of interstate distribution and marketing.

The scope and purpose of the Commerce Clause was described by this Court in *Hood & Sons* v. *DuMond*, 336 U.S. 525 (1949), and that philosophy was reiterated this Term in *Allenberg Cotton Co.* v. *Pittman*, *supra*, 42 L.Ed. 2d at 205:

> Our system, fostered by the Commerce Clause, is that every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation, that no home embargoes will withhold his exports, and no foreign state will by custom duties or regulations exclude them. Likewise, every consumer may look to the free competition from every producing area in the Nation to protect him from exploitation by any. Such was the vision of the Founders; such has been the doctrine of this Court which has given it reality.

The decision below cannot be reconciled with this Court's consistent view of the Commerce Clause and its application to goods in interstate commerce. The policy of free trade fostered by the Commerce Clause has been compromised by the appellate court's unjustifiable distinction between instrumentalities on the one hand which aid interstate transportation, and distribution facilities on the other which aid the interstate flow of goods and products. Contrary to this Court's decisions, the Court of Appeals has virtually insulated from future Commerce Clause challenges the operation of singular local legislation which impedes the free flow of consumer products commonly distributed in interstate commerce.

CONCLUSION

For the foregoing reasons, the petition of The Procter and Gamble Company and FMC Corporation for the issuance of a Writ of Certiorari should be granted.

Respectfully submitted,

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